United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-2078

United States Court of Appeals

FOR THE SECOND CIRCUIT

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P/S

UNITED STATES, *ex rel.* STEPHEN P. SAPIENZA,
Petitioner, on behalf of ALFRED A. ARGENTINE,

Relator-Appellant,

against

LEON J. VINCENT, Warden, Green Haven Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

APPELLANT'S REPLY BRIEF

REISCH, KLAR & LANE, P. C.,
Attorneys for Relator-Appellant,
1501 Franklin Avenue,
Mineola, N. Y. 11501

BURTON C. AGATA,
Of Counsel and on the Brief.

3

TABLE OF CONTENTS

TABLE OF CASES

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This brief is submitted in reply to Respondent's brief.

INTRODUCTION

Appellant replies explicitly to only some of the points in Respondent's brief. The others are adequately covered in the main brief and response would involve only repetition. However, it should be noted that in the attempt to reduce the facts, Respondent has chosen

to ignore many of them. There surely is nothing in this record to evidence "deliberate bypass" or waiver of remedies by Argentine. He has been battling in the state courts and now comes to the federal court after waiting over five years for a decision which still has not been rendered in one state Habeas Corpus proceeding. (App. Br.10-11). Surely, Judge Judd's conclusion that further state court proceedings would be "ineffective" should be accepted.

POINT I. ARGENTINE WAS UNCONSTITUTIONALLY DENIED THE RIGHT TO REPRESENT HIMSELF.

Respondent, in effect, suggests that Appellant's claim of denial of his right to proceed pro se was somehow an after-thought, encouraged by Faretta v. California, ____U.S. _____, 95 S. Ct. 2525 (1975) and not seriously pursued in the District Court (Br. 6). Of course, the record speaks for itself. The first heading in the Second Amended Petition clearly states, "Denials of Rights with Respect to Assistance of Counsel and the Right to Proceed Pro Se" and the petition sets forth the facts relating to these points (102a-107a). Respondent's choice to answer this petition with a letter in which it did not recognize that these points were being presented does not change the thrust of the Petition (135a).*

Turning to Respondent's substantive argument on the **pro**

*Of course, Appellant is somewhat encouraged by Faretta, as well he should be, but this Circuit anticipated Faretta in United States ex rel Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), cert. den. 384 U.S. 1007 (1966).

se issue, Appellant relies on the detailed argument set forth in Point I in his original brief and will not repeat it here. At this juncture, Appellant only responds to several points which appear in Respondent's brief:

(1) United States ex rel Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965) cert. den. 384 U.S. 1007 (1966), recognizes the absolute right to choose to proceed pro se at any time prior to trial. Contrary to Respondent's contention (R. Br. 10), Faretta, supra, does not limit this right. Indeed, even the dissent recognized that Faretta did not preclude the right to proceed pro se even after the trial had begun. Faretta, supra, at 2549 (Blackmun, J. dissent). One issue in this case, of course, is whether Argentine had demanded the right to proceed pro se prior to trial. Appellant chooses to ignore Judge Kelly's statement that he had made such a demand as being null and void (R. Br. 9). The fact, however, is that Judge Kelly, the presiding trial judge, did make the statement and it is consistent with and corroborative of Argentine's position.

(2) Respondent's reliance on United States v. Catino, 403 F. 2d 491 (2d Cir. 1968), cert. denied 394 U.S. 1003 as being on "all-fours" with the case at bar is misplaced. (R. Br. 11). In Catino, the defendant apparently had rejected legal aid and retained his own counsel, before asking to

discharge the retained counsel and proceed pro se. Neither Catino nor United States v. Ellenbogen, 364 F.2d 982, 988-89 (2d Cir. 1966), also cited by Respondent (R. Br. 11), are helpful in deciding this case. If there is discretion lodged in the trial judge to deny a defendant the right to proceed pro se after the trial has begun, the factors in its exercise must be examined and surely opinions such as Catino and Ellenbogen which do not set forth the factors considered in these cases are neither helpful nor binding in this case.

(3) Respondent relies on the following to uphold Judge Kelly's denial of Argentine's application to proceed pro se at the close of the prosecution's case (R. Br. 12):

(i) First, it is claimed that "dismissal of counsel" would have been disruptive (R. Br. 12). For this proposition, Respondent points to the fact that the "prosecution objected', concludes defense counsel was skillful and asserts Argentine wanted to subpoena six witnesses. (R. Br. 12). The prosecution's objection is irrelevant as is whether or not counsel was skillful. When a defendant elects to proceed pro se, he is exercising his right to proceed without counsel, skillful or not. As to Argentine's desire to subpoena six witnesses, if it should have been denied, it could have been denied

and the request to proceed pro se granted. Indeed, it appears that Judge Kelly did treat them separately and did not believe that affording Argentine the right to proceed pro se meant delay for the purpose of obtaining witnesses (Tr. 289-91).

(ii) Second, Respondent contends that a state court judge's exercise of discretion should not be reviewed in this federal habeas corpus proceeding (R. Br. 12). This position ignores the fact that Maldonado does recognize a right to proceed pro se even after trial has begun. Even if it is proper to characterize it as a "sharply curtailed right" subject to the exercise of discretion, it is subject to review where it is claimed that a constitutional right was violated by the state court in the exercise of its discretion.

Appellant has urged that the right to proceed pro se is absolute at any time with the court having the right to impose such conditions as will avoid impairing the orderly administration of justice (App. Br. 23-25). However, assuming that the right is not absolute after trial has commenced, but subject to the standard in Maldonado, there was no disruptive element in this case. The factors which favored granting Argentine's request are sufficiently detailed in the main

brief (App. Br. 16-23). Respondent has not set forth any reason which would support denying Argentine's request to proceed pro se. Indeed, if the reasons set forth by Respondent are sufficient, then Maldonado rule concerning any right to proceed pro se after trial has begun becomes an empty verbal formula.

POINT II. ARGENTINE WAS DENIED COUNSEL BY BEING COMPELLED TO PROCEED WITH COUNSEL WITH WHOM THERE WAS IRRECONCILABLE CONFLICT.

On a par with Respondent's refusal to recognize the fact the pro se issue was directly raised below, is Respondent's assertion that "nowhere to be found in the several amended petitions" is Argentine's claim that his irreconcilable conflict with counsel constituted a deprivation of effective assistance of counsel (R. Br. 13). The claim was asserted and detailed in the Second Amended Petition (102a-107a) and the legal significance of those facts is covered in Point II of Appellant's main brief.

Turning to the merits of the issue, Respondent urges that ineffectiveness of counsel must rise to the "shock the conscience" level to be effectively urged. Whether or not this is a correct statement of the applicable standard in an ineffective counsel case, reliance on it in this case misses the point. In this case, Appellant claims that the irreconcilable conflict with counsel had the effect of denying him any assistance of counsel. This is the teaching of

Brown v. Craven, 424 F. 2d 1166 (9th Cir. 1970), cited and discussed with apparent approval by the Second Circuit in United States v. Morrissey, 461 F. 2d 666 (2d Cir. 1972). Respondent suggests that either or both the "irreconcilable conflict" standard and the duty of the trial judge to make some inquiry concerning the conflict and to seek a resolution are not based on the Sixth Amendment. (R. Br. 15). This is error. Both Brown v. Craven, supra, and Morrissey, supra, consider this "irreconcilable conflict" rule to be based on the Sixtn Amendment and applicable to the States through the Fourteenth Amendment. Indeed, Brown v. Craven, supra, involved a state prisoner and that case was the source of Morrissey's reference to the need for an inquiry by the trial judge. See Brown v. Craven, supra, at 1170 and United States v. Morrissey, supra, at 670. Hence, Respondent's assertion at page 15 of its brief that the "court's suggestion in Morrissey as to inquiries on the dissatisfaction (within the federal criminal justice hierarchy) are not constitutional requirements. They were made in a supervisory role as the Appellate Division would to a state", is wholly at odds with the applicable cases.

The Court's attention is invited to the fact that nowhere does Respondent deny that there was irreconcilable conflict nor does it deal with any of the consequences of that unfortunate situation. Thus, the active opposition of counsel to defendant's positions and the early awareness of

the court of the conflict and not only its failure to act but its sanctioning of counsel's decision not to confer further with his client, are ignored by Respondent. These factors and others are discussed in detail in Appellant's main brief and repetition would be inappropriate. Suffice it to say, Respondent chooses to shift the focus by ignoring the facts.

CONCLUSION

For the foregoing reasons the judgment dismissing the petition should be reversed with an order granting the petition or ordering a hearing.

Respectfully submitted,

Dated: October 16, 1975

REISCH, KLAR & LANE, P.C.
Attorneys for Relator-Appellant
1501 Franklin Avenue
Mineola, New York 11501

Burton C. Agata
Of Counsel and
on the Brief

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against
Leon J. Vincent, Warden Green Haven Correctional Facility
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State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Burton C. Agata, being duly sworn deposes and says that he is the attorney for the above named Relator-Appellant herein. That he is over 21 years of age, is not a party to the action and resides at 8 Mill Lane Levittown, New York

That on the 20th day of October, 1975, he served the within
Reply Brief

upon the attorneys for the parties and at the addresses as specified below

1. Louis J. Lefkowitz
Attorney General State of New York
2 World Trade Center
45th Floor
New York, New York

by depositing 3 true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 20th day of October, 1975

Raymond J. Braddick

Roland W. Johnson
Roland W. Johnson,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977